# INDEX

CITATIONS

Cases:

Cases—Continued

# In the Supreme Court of the United States

OCTOBER TERM, 1962

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No. 489

RAYMOND DOWNUM, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES

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### OPINION BELOW

The opinion of the court of appeals (R. 38–43) is not yet reported.

### JURISDICTION

The judgment of the court of appeals was entered on March 9, 1962 (R. 44). The petition for a writ of certiorari was filed on April 6, 1962, and was granted on October 8, 1962 (R. 45; 371 U.S. 811). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

### QUESTION PRESENTED

Whether petitioner was subjected to double jeopardy, in violation of the Fifth Amendment, by his

trial before a second jury two days after the court discharged the first jury because of the absence of a key government witness (for whom a subpoena had been issued but not served), where the discharge was ordered after the first jury had been sworn but before any other step had been taken.

### CONSTITUTIONAL PROVISION INVOLVED

The pertinent portion of the Fifth Amendment provides as follows:

> No person shall * * * be subject for the same offence to be twice put in jeopardy of life or limb; * * *

### STATEMENT

Petitioner and three codefendants were indicted on April 17, 1961, in the United States District Court for the Western District of Texas on charges of stealing from the United States mail, forging endorsements on government checks thus stolen, uttering the checks, and conspiracy (R. 1–4).[1] Following

[1] The various counts charged:

Count 1, that defendants Juan R. Campos, Ronnie Heck and Raymond Heck stole from a house letter box a letter addressed to Dolores M. Cameron.

Count 2, that Ronnie Heck forged the name of Dolores M. Cameron, payee of a government check in the amount of $56.30, contained in said letter.

Count 3, that said defendants and petitioner uttered said check as true, knowing that the endorsement was forged.

Count 4, that petitioner forged the name of Jayne M. Maltsberger, payee of a government check in the amount of $58.00.

Count 5, that all four defendants uttered said check as true, knowing that the endorsement was forged.

Count 6, that petitioner forged the name of Clarence D.

pleas of guilty by other defendants, petitioner was tried alone before a jury and convicted on counts 3 to 8, inclusive, the only counts applicable to him (R. 35–37, 25). He was sentenced to imprisonment for eight years on counts 3 to 7, inclusive, and concurrently therewith to five years imprisonment on the conspiracy charge (R. 24). The court of appeals affirmed (R. 38–44). The relevant proceedings may be summarized as follows:

On April 19, 1961, petitioner was arraigned in open court and pleaded not guilty (R. 31–38). On the morning of Tuesday, April 25, 1961, the case was called for trial and both sides announced ready. A jury was then selected and sworn and instructed to return to the courtroom at 2:00 p.m. (R. 9). At the opening of the afternoon session before the jury was assembled in the box the following colloquy took place (R. 10–11):

> The COURT. Mr. Tinsman, in your case the Government's key witness is not here. They announced ready and didn't have the witness when they announced. So I am going to discharge this jury from the case, and pass it.
>
> Mr. TINSMAN [defense counsel]. Is it permissible to tell me who the Government's key witness is that's missing?

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Rutledge, payee of a government check in the amount of $19.00.

Count 7, that petitioner uttered said check as true, knowing that the endorsement was forged.

Count 8, that the defendants conspired to commit the foregoing offenses.

Mr. McDONALD [Assistant United States Attorney]. Mr. Rutledge, one of the named payees in the indictment. It is Counts 6 and 7 of the indictment.

Mr. TINSMAN. Well, are you unable to find him?

Mr. McDONALD. We have been unable to have the subpoena served at the present time.

Mr. TINSMAN. Your Honor, I feel this way. In view of the fact this is only as to two counts of the indictment, and there are still, as to Raymond Downum, four other counts, and in view of the fact the Government announced ready and we picked the jury, that we should go forward at this time on the counts that I assume they are ready on—the other counts.

The COURT. Do you want to have two trials?

Mr. TINSMAN. At this time, Your Honor, I think I am in the position that I would just as soon have two trials. I picked a jury and I think it's a satisfactory jury.

The COURT. I am not willing to have two trials. It will take too much time of the Court. The Government shouldn't have picked a jury when they weren't ready. Unfortunately, they didn't check up on the witnesses.

Mr. TINSMAN. Let me make a motion at this time to dismiss Counts 6 and 7 for want of prosecution.

The COURT. Those are the two counts?

Mr. TINSMAN. Yes, sir.

The COURT. I will overrule the motion because they expect to give you a trial later this week or next week.

Mr. TINSMAN. All right, sir.

The COURT. So when the jury comes in I will just discharge them from this case and may use them in another case. Is your defendant on bond?

Mr. TINSMAN. No. The defendant is in the county jail.

The COURT. Take charge of him, Mr. Marshal.

Two days later—on the afternoon of Thursday, April 27—the case was called and petitioner's counsel pleaded former jeopardy (R. 5–9, 11–12). On the following morning, Friday, April 28, petitioner announced ready for trial, subject to his motion. After petitioner had been tried and found guilty as charged (R. 12–16), his counsel developed the facts on the plea of former jeopardy in a colloquy with the Assistant United States Attorney. The latter stated that on the Wednesday or Thursday of the preceding week, twelve cases were set for call on the following Monday. Approximately one hundred witnesses had to be called. Subpoenas for all the witnesses, including Mr. Rutledge, were prepared and delivered to the marshal for service. On Monday, the day before this case came up, the Assistant United States Attorney checked with the marshal and received the information that the witness' wife was going to let him know where her husband was, if she could find out (R. 16–17). He was unable to check immediately at the time the case was called (Tuesday) as he was in another case the morning of that day (R. 16–18). There were three attorneys on duty at that time, a fourth being on leave for military service. All of the available attorneys were

"swamped," due to the fact that twelves cases were set. Petitioner's case was number ten on the list and the Assistant United States Attorney had not foreseen that it would come up for trial on the second day of the week (R. 18–21).

The court stated that it knew as a fact that these cases were set "on very short notice" and that every one of the attorneys "was head over heels in work" (R. 18). The plea of double jeopardy, which was also renewed at the time of sentencing, was overruled (R. 22–26).

The court of appeals affirmed the district court's rejection of the plea, stating (R. 41):

> * * * whatever may be the reaches or impact of this Amendment in other situations shading off of the precise one here, the fundamental purpose of this guarantee is not lost or diminished here by permitting a trial before a new jury after discharge of the first one. The circumstances do not here tip the scales in favor of the accused. Downum was never formally arraigned in the presence of the first jury. No evidence was presented for or against him. Downum was never put to his defense. What, and all there had been, was the impaneling of the first jury and its discharge for reasons entirely unrelated to the jury or the composition of it.

## SUMMARY OF ARGUMENT

### I

Consideration of the common law history and development of double jeopardy concepts establishes that where there has been no adjudication on the merits, a trial before a second jury is barred only

when, under the particular circumstances, it represents oppressive practice on the part of the government.

The American concept of double jeopardy is an amalgam of two distinct and ancient ideas: (1) the old common law plea of *autrefois acquit* or *convict*, a plea which lay only where there had been a final verdict of innocence or guilt, and (2) the rule that a jury, once empanelled, could never be discharged before delivering a verdict. The latter theory, rejected as an absolute bar to retrial in 1824 in *United States* v. *Perez*, 9 Wheat. 579, has developed into the flexible limitation that when the jury is discharged before a verdict, the right to a retrial depends upon its essential fairness to the defendant and to the government as the representative of the public.

Contrary to petitioner's contention, the double jeopardy clause does not impose a fixed rule that once a defendant has been placed in jeopardy, he cannot be brought before a second jury. This is demonstrated not only by history but also by the fact that this Court has upheld the right of retrial in every case in which the discharge of the jury before verdict has been questioned. In each such case the defendant was twice in jeopardy but in each there was no unfairness or harassment. There having been no unfairness here—petitioner can show no prejudice, injustice or oppression—his trial before a second jury was proper.

## II

In this case petitioner had not been put in jeopardy in any realistic sense. A jury had been sworn after the case was announced ready. Nothing more was

done. Before the jury had even assembled in the box for the opening of trial, it was discovered that an important witness, known to be available and for whom a subpoena had actually been issued, had not in fact been served. The court thereupon discharged the jury and advised petitioner that he would be tried later in the week. Two days later he was tried before a new jury.

Petitioner can show no prejudice from the procedure here followed. This is not a case where the government proceeded to trial without knowing whether or not it had the evidence to prove its case. Here, the witness was known to be available within a day or two; the prosecution had merely failed to discover that the subpoena, although issued, had not been served—an oversight which the judge, who was familiar with the circumstances, found to be excusable. Admittedly, a two-day continuance would have been proper; but if it were not an appellate reversal of a conviction after such continuance would not bar a subsequent trial. The double jeopardy clause does not entitle the petitioner to a judgment of acquittal because, instead of the case being continued, a jury which had not begun to hear the case was discharged and another jury chosen two days later.

The government recognizes that the prosecution is not entitled to a mistrial because its case is going badly or because it does not have the evidence to prove its case. For this reason the courts properly view with strictness a discharge of the jury because of the absence of witnesses. But to discharge a jury

for that reason does not automatically bar a second trial without regard to whether such second trial would be fair to the defendant and in the interest of the administration of justice. *Wade* v. *Hunter,* 336 U.S. 684. The circumstances here show that fairness and public justice justified the trial court in rejecting the plea of double jeopardy and permitting a trial of the merits of the grand jury's indictment.

## ARGUMENT

In this case, the "first trial" upon which petitioner rests his claim of double jeopardy consists of the swearing of a jury. Beyond that nothing was done, not even the assembling of the jury in the box to hear the case. Before even that could occur, the prosecutor had discovered and informed the court that through oversight (understandable under the circumstances, as we discuss below) the subpoena to a material witness had not been served. Admittedly, if the court then had continued the case for two days, there could have been no claim of double jeopardy. Nor, we submit, considering the circumstances disclosed in this record, could a two-day continuance on request of the government have been deemed an abuse of discretion. However, instead of holding the jury together for two days of wasteful inaction, or adopting the alternatives suggested by petitioner of severing the trial in two or dismissing the counts in which the witness was involved, the judge decided to discharge the jury, which had not yet begun to act as such in the trial of the case; and he set the case for trial two days later.

The question which this case presents is whether the trial judge's decision to discharge the jury so violated the rights of petitioner that he must be given the equivalent of a judgment of acquittal with the right never to be tried for the offense charged. It is the government's position that neither the double jeopardy clause of the Constitution, nor the decisions interpreting it, nor any considerations of due process require a result so contrary to the interests of public justice. It is clear that had the court granted a continuance and been reversed on appeal, petitioner could have been retried before a new jury. It would indeed be anomalous if the law which will require the defendant to undergo two such full trials were held to grant him immunity from one because a jury which had not begun to hear the case has been discharged.

It is not the law that once a jury has been impanelled in a criminal case, its discharge before any evidence has been submitted automatically bars the government from trying the defendant before another jury. On the contrary, both the history of the double jeopardy provision and the settled course of judicial decision establish that the determination whether the discharge of a jury bars a subsequent prosecution depends not upon technical rules, but upon whether, in the circumstances of the particular case, such prosecution would result in any basic unfairness to the defendant. In this case, the trial and conviction of the petitioner, two days after the discharge of the first jury, to which no evidence had been submitted, plainly did not prejudice petitioner or deny him any consti-

tutional rights. In these circumstances, his second trial did not constitute double jeopardy.

## I

### THE RIGHT TO RETRY A DEFENDANT AFTER A JURY HAS BEEN DISCHARGED WITHOUT REACHING A JUDGMENT ON THE MERITS DEPENDS ON CONSIDERATIONS OF ESSENTIAL FAIRNESS TO THE DEFENDANT AND THE GOVERNMENT

The present American concept of double jeopardy represent an amalgam of two ideas having a different origin and history. The main source of the double jeopardy clause, and its primary content, was the common law pleas of *autrefois acquit* or *autrefois convict*. Blackstone pointed out that (4 Blackstone, *Commentaries*, 335–336):

> * * * [T]he plea of *autrefois acquit*, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence * * *.[2]

Those pleas, however, did not lie unless a verdict of either innocence or guilt was delivered by the trier of fact. 2 Wharton, *Criminal Procedure* (10th ed.), Sec. 1426; 2 Hale, *Pleas of the Crown* (1847), 241–242; 2 Hawkins, *Pleas of the Crown*, 527 (6th ed. 1787). See *Regina* v. *Winsor*, 10 Cox C.C. 276, 327, 329 (Q.B.

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[2] A passage from Bracton shows an awareness of such a doctrine. He notes that an appellee who vanquishes the appellant in battle is absolved from further suits, even from "the suit of the king, because by this he purges his innocence against them all, as if he had put himself upon the country, and the country had altogether acquitted him." II Bracton, *Laws and Customs of England*, c. 19, § 8. See also 2 Hawkins, *Pleas of the Crown*, 527 (6th ed. 1787).

1865, Ex. Ch. 1866); *Regina* v. *Charlesworth*, 5 L.T. 150, 151 (Q.B. 1861).

The second element—the power to declare a mistrial—has a very different background. It begins with the ancient notion that the jury, once empanelled, is irrevocably vested with the exclusive power—and, no less important, the unshakable duty—finally to dispose of the cause. The mystical notion that a jury, once assembled, must sit to the end continued to have force long after the ideas which gave rise to it had disappeared, probably because it represented a bar to the abuse of power by the Crown's prosecutor. Undoubtedly because it represented a weapon against abuse, this limitation upon the court's power to discharge the jury developed in the United States not only in terms of power, as it had in England, but of fairness as well. In time, the limitation became a gloss upon the double jeopardy clause. However, the extent of the limitation, as reflected in the decisions in this field, has remained confused due to its historic development from a concept of power to one of a mixture of power and fairness. It is our position, fortified we believe by all the decisions of this Court in this field, that where a jury is discharged for any reason before verdict, retrial may be had without violating the double jeopardy clause, except where the declaration of mistrial is the result of an abuse of power by the prosecution.

A. THE ENGLISH BACKGROUND AS TO THE POWER OF JUDGES TO DISCHARGE JURIES BEFORE VERDICT

The theoretical concept of the duty of a jury at common law was thus summarized by Lord Coke (3 Inst. 110):

> To speak it here once for all, if any person be indicted of treason, or of felony, or larceny, and plead not guilty, and thereupon a jury is returned, and sworn, their verdict must be heard, and they cannot be discharged * * *.

Not only could the jury not be discharged at the request either of the Crown or of the prisoner, or of both, but the possibility of jurors failing to agree was forestalled, by not releasing them until they *did agree* (2 Coke upon Littleton, Book 3, c. 5, Sec. 366):

> By the law of England a jury, after their evidence given upon the issue, ought to be kept together in some convenient place, without meat or drinke, fire or candle, which some bookes call an imprisonment, and without speech with any, unlesse it be the bailife, and with him onely if they be agreed. * * *

The verdict, once entered, was in turn final and conclusive; neither a writ of error nor a new trial could be had even by the defendant.[3]

These attributes of the jury system at early common law can be explained only as reflecting an almost mystical concept of the jury as an organ of truth

[3] See opinion of Mr. Justice Story, on circuit, in *United States* v. *Gibert*, 2 Sumner 19, 25 Fed. Cas. 1287, 1294–1303 (No. 15,204) (D. Mass. 1834); Mayers and Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 Harv. L. Rev. 1, 4.

endowed, perhaps divinely, with the final authority to adjudge the case—a concept which, however foreign to modern ears, no doubt seemed less strange to a society that had but recently found truth revealed by physical combat or by ordeal. Whatever the genesis of the rule, however, it seems evident that its concern was not, as such, the protection of the prisoner in the individual case, for the coercion of the jury to reach a verdict and the denial of any remedy for error, either by mistrial or by appeal, seem harsh indeed by today's standards. Rather, the rule was essentially a "jurisdictional" one, concerned simply with the division of power between the jury and the judges. The authority to decide the case was in the jury, and the judges had no more power to discharge the jury before verdict than they did to reverse its decision or order a new trial after verdict.

It also appears that the idea of keeping one jury together to reach a verdict was kept alive after its mystical origin had lost force because it was a theoretical weapon against abuse of royal power by the prosecution. There seems no doubt, however, that in actual practice juries were on occasion discharged before verdict, starting with the situations where events, such as the death or illness of a juror, made it impossible for a verdict to be reached.[4] In addition, Hale in his *Pleas of the Crown*, Vol. 2, p. 295, reports that it was common practice to discharge the jury and order a retrial if it appeared that

[4] See opinion of Cockburn, C. J., in *Regina* v. *Winsor*, 10 Cox C.C. 276, 310 (Q.B. 1865, Ex. Ch. 1866).

some of the evidence was not then available. And at the time of the Stuarts, indeed, the practice became subject to considerable abuse. An example of the vexatious practices of the day is *Whitebread and Fenwick's Case*, 7 State Trials 311, 315, where the Crown, seeing that its evidence was insufficient, moved for a mistrial in order to gather more evidence. Upon obtaining the evidence, the defendants were retried.

*After the Revolution of* 1688, the pendulum swung back and there seems to have been some agreement among the judges severely limiting the practice of discharging jurors before verdict.[5] Once again, however, it was found impossible to adhere to a rigid rule. In the case of the two *Kinlochs*, Foster, *Crown Cases* 16 (1746), the question arose whether, on a trial for treason, a capital offense, the court had power, at the defendant's request, to discharge a jury so that the defendant could put in a defense that would otherwise have been unavailable to him. The issue was raised by a motion in arrest of judgment after the defendant had been retried and convicted. Foster reports that all ten judges, except one, agreed that the conviction at the second trial should be upheld and that they agreed "that admitting the rule laid down by Lord Coke to be a good general rule, yet

[5] The agreement was reported as being that there would be no withdrawal of a jury without consent in felony cases and none, even with consent, in capital cases, but the accuracy of this report was questioned by Foster in his summary of the case of the two *Kinlochs*, discussed in the text. See Foster, *Crown Cases*, pp 27–28.

it cannot be universally binding: nor is it easy to lay down any rule that will be so" (*id.* at 27). All of them agreed, however, in condemning the practice of discharging a jury to permit the Crown to obtain further evidence as had been done in the case of *Whitebread and Fenwick* under the Stuarts.

This decision emphasizes that the English development of the power to discharge juries was in terms, not of a privilege personal to the defendant, but of jurisdictional concepts of the powers vested in juries, which might operate equally in favor of or against the defendant. That was reflected, indeed, in the procedural mode by which the question was raised. Unlike the pleas *autrefois acquit* or *autrefois convict*, which were in the nature of pleas in bar, the objection that a jury had been previously sworn and discharged was raised by a motion in arrest of judgment which challenged the *jurisdiction* of the second tribunal.[6] It was because the matter was so viewed—rather than as being a privilege of the defendant that he might raise to bar the second trial—that the issue was considered so doubtful in the *Kinlochs* case notwithstanding that the discharge of the original jury had been at the defendant's request and for his benefit. While the defendant could have waived his "privilege," if such it had been, to be tried by the original jury, he could not confer upon a second jury a power that the law had given exclusively to the first.

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[6] See, *e.g.*, *Regina* v. *Charlesworth*, *supra*; *Regina* v. *Winsor*, *supra*. The issue was raised by a plea in bar before the second trial in *Conway and Lynch* v. *Regina*, 7 Irish Law Rep. 149, and the Crown did not object. The judges decided the issue, but expressed doubts as to whether the procedure was correct.

The consequence of viewing the problem essentially as one of the impotence of the judge to take from the original jury its power of decision and give it to another jury was that, once that conceptual difficulty was overcome, there remained nothing to prevent a second trial whatever the reason for the discharge of the first jury may have been. In the middle of the nineteenth century, the English courts definitively upheld the power of a judge to discharge a jury which could not reach agreement.[7] By this time there was no fear in England of abuse of royal authority and the concept of separation of powers between executive and judiciary had less significance for the British than for Americans. Accordingly, once the English courts held that the power given the first jury was not irrevocable, it followed that there was no bar to a second trial whether or not the power to discharge the first jury had been erroneously or improperly exercised, and the courts so held. See opinion of Erle, C. J., for the Exchequer Chamber in *Regina* v. *Winsor; supra,* 10 Cox C.C. at 329; *Rex* v. *Lewis,* 78 L.J. K.B. (N.S.) 722 (1909); *Regina* v. *Davison,* 2 F. and F. 250, 254 (1860). Indeed, in *Rex* v. *Lewis,* the Court of Criminal Appeal expressly disapproved of the ground for which a mistrial had been declared (because prosecution witnesses were absent) but nevertheless upheld the retrial and ultimate conviction of the defendant.

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[7] *Regina* v. *Charlesworth,* 5 L.T. 150 (Q.B. 1861); *Regina* v. *Winsor,* 10 Cox C.C. 276 (Q.B. 1865, Ex. Ch. 1866).

A contrary ruling was reached in *Conway and Lynch* v. *Regina,* 7 Irish Law Rep. 149, but the dissenting opinion of Justice Crampton in that case was adopted in the cases cited above.

B. IN THE UNITED STATES THE QUESTION OF THE POWER TO DISCHARGE A JURY BECAME INTERMINGLED WITH ISSUES OF FAIRNESS AS A GLOSS ON THE DOUBLE JEOPARDY CLAUSE

*1. At the time of its adoption the double jeopardy clause of the Constitution was not concerned with the problem of the power to discharge a jury before verdict*

a. There is considerable reason to believe that the double jeopardy clause of the Constitution was not concerned at all with the then unsettled question of English law as to the power of a judge to discharge a jury before verdict. The purpose of the Bill of Rights was to codify the already well established principles of liberty. In introducing a draft of proposed amendments to the Constitution, on June 8, 1789, Representative Madison, after mentioning various objections which had been made against the original document, said (1 *Annals of Congress* 433):

> [B]ut I believe that the great mass of the people who opposed it, disliked it because it did not contain effectual provisions against the encroachments on particular rights, and those safeguards which they have been long accustomed to have interposed between them and the magistrate who exercises the sovereign power; nor ought we to consider them safe, while a great number of our fellow-citizens think these securities necessary.
>
> It is a fortunate thing that the objection to Government has been made on the ground I stated; because it will be practicable, on that ground, to obviate the objection, so far as to satisfy the public mind that their liberties will be perpetual and this without endangering any part of the Constitution, which is considered as essential to the existence of the Government by those who promoted its adoption.

He concluded that it would be "proper in itself, and highly politic, for the tranquillity of the public mind, and the stability of the Government, that we should offer something, in the form I have proposed, to be incorporated in the system of Government, as a declaration of the rights of the people" (*id.* at 439–440).

The provision under consideration was phrased in the Madison draft as follows (*id.* at 434):

> No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence; * * *

In view of the stated purpose of the amendments, the intent of the "one punishment or one trial for the same offence" clause was obviously to cover either a conviction or an acquittal for the same offense. However, an ambiguity in the language was pointed out by Representative Benson in debate, on August 17, 1789 (*id.* at 753):

> Mr. BENSON thought the committee could not agree to the amendment in the manner it stood, because its meaning appeared rather doubtful. It says that no person shall be tried more than once for the same offence. This is contrary to the right heretofore established; he presumed it was intended to express what was secured by our former Constitution, that no man's life should be more than once put in jeopardy for the same offence; yet it was well known, that they were entitled to more than one trial. The humane intention of the clause was to prevent more than one punishment, for which reason he would move to amend it by striking out the words "one trial or."

These views were seconded by another member (*ibid.*):

> Mr. SHERMAN approved of the motion. He said, that as the clause now stood, a person found guilty could not arrest the judgment, and obtain a second trial in his own favor. He thought that the courts of justice would never think of trying and punishing twice for the same offence. If the person was acquitted on the first trial, he ought not to be tried a second time, but if he was convicted on the first, and any thing should appear to set the judgment aside, he was entitled to a second, which was certainly favorable to him. Now the clause as it stands would deprive him of that advantage.

But the attempted correction of a flaw in the original language would have created a second, more serious flaw. Striking out the words "one trial or," would leave nothing in the clause to prevent a second trial after an accused had been acquitted. This was pointed out by another member (*ibid.*):

> Mr. LIVERMORE thought the clause very essential; it was declaratory of the law as it now stood; striking out the words would seem as if they meant to change the law by implication, and expose a man to the danger of more than one trial. Many persons may be brought to trial for crimes they are guilty of, but for want of evidence may be acquitted; in such cases it is the universal practice in Great Britain, and in this country, that persons shall not be brought to a second trial for the same offence; therefore the clause is proper as it stands.

> Mr. SEDGWICK thought, instead of securing the liberty of the subject, it would be abridging the privileges of those who were prosecuted.

The latter view carried the day and the motion was lost (*ibid.*). Further changes in the wording of the clause do not appear in the Annals.

While the Annals thus fail to give an explicit account of how the present language of the provision "twice put in jeopardy" was adopted, it appears to relate to the common law pleas of former acquittal and former conviction. The term "former jeopardy" was used in the English common law as an abbreviated description of those defenses.[8] Mr. Benson's particular interest in the clause, the fact that the final amendment used the word "jeopardy," which Mr. Benson had himself used in its common law sense during debate, and the further fact that the other members of the committee disagreed with him only as to the

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[8] The interchangeability of the terms is illustrated by *Vaux's Case*, 4 Co. Rep. 44a, 45a:

> (T)he life of a man shall not be twice put in jeopardy for one and the same offence, and that is the reason and cause that *auterfoits* acquitted or convicted of the same offense is a good plea * * *.

And by Blackstone, 4 *Commentaries*, 335:

> (T)he plea of *auterfoits acquit*, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once, for the same offence. And hence it is allowed as a consequence, that when a man is once fairly found not guilty upon any indictment, or other prosecution, before any court having competent jurisdiction of the offense, he may plead such acquittal in bar of any subsequent accusation for the same crime. * * *

choice of language, all lead to this conclusion, particularly since the universally agreed purpose of all the amendments was to restate existing rights and guaranty their preservation, rather than to create any new rights.

b. The early federal decisions make clear that the right to discharge a jury before verdict and retry the defendant was considered as something apart from the question of double jeopardy. In *United States* v. *Perez*, 9 Wheat. 579, decided in 1824, in holding that there could be a retrial in a capital case after the jury had failed to agree, this Court, through Mr. Justice Story, said (pp. 579–580):

> We are of opinion, that the facts constitute no legal bar to a future trial. The prisoner has not been convicted or acquitted, and may again be put upon his defence. We think, that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances; and for very plain and obvious causes; and in capital cases especially, courts should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faith-

> ful, sound and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the judges, under their oaths of office. * * *

The *Perez* opinion seems clearly to have adopted what later became the English view that, while as a matter of practice the power to order a discharge ought to be sparingly exercised, even an erroneous discharge would not operate to bar a second trial, for so long as the defendant "has not been convicted or acquitted," he "may again be put upon his defence." The necessary implication was that the double jeopardy clause was limited to the common law pleas in bar—*autrefois acquit* or *convict*—and that there was no prior jeopardy within the meaning of the Constitution so long as the prior trial was aborted before verdict. That implication is confirmed by the opinion of Mr. Justice Washington, who participated in the *Perez* decision, just a few months earlier in *United States* v. *Haskell,* 4 Wash. C.C. 402, 26 Fed. Cases 207 (No. 15,321), where, sitting on circuit, he had expressly held that the double jeopardy clause of the Fifth Amendment was limited to prior convictions or acquittals and was inapplicable to mistrials. He made this point (26 Fed. Cases at 212):

> We are in short of opinion, that the moment it is admitted that in cases of necessity the court is authorized to discharge the jury, the whole argument for applying this article of the constitution to a discharge of the jury before conviction and judgment is abandoned, because the exception of necessity is not to be found in any part of the constitution; and

> I should consider this court as stepping beyond its duty in interpolating it into that instrument, if the article of the constitution is applicable to a case of this kind. We admit the exception, but we do it because that article does not apply to a jeopardy short of conviction. * * *

Story himself, in the first edition of his *Commentaries on the Constitution* (1833), published only nine years after his opinion in *Perez*, confirmed that view of the Fifth Amendment (Sec. 1787):

> * * * The meaning of it is, that a party shall not be tried a second time for the same offence after he has once been convicted or acquitted of the offence charged by the verdict of a jury * * *. But it does not mean that he shall be tried for the offence a second time if the jury shall have been discharged without giving a verdict; * * * for in such case his life or limb cannot judicially be said to have been put in jeopardy.[9]

*2. In order to protect a defendant from unfair treatment by the prosecution, double jeopardy took on content in this country as a limitation on the court's power to discharge a jury and permit retrial*

The discussion of the double jeopardy clause as a limitation upon the court's power to discharge a

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[9] Mr. Justice Story again expressed the same view the following year while sitting on circuit, saying of the decision in *Perez* that "the court did not go into any exposition of the clause of the Constitution * * * but simply stated that in the case of Perez, the prisoner had not been convicted or acquitted and *therefore* might again be put upon his defence."

jury and permit retrial seems to have started with state decisions. Since the question of power to discharge juries at all, even in the case of disagreement, was in an unsettled state in England at the time the Bill of Rights was adopted, and since the text book writers, on whom American lawyers relied to a considerable extent, stated the rule against discharge more categorically than was probably the actual practice,[10] it is not surprising that the state decisions varied. The power to discharge the jury was denied in *State* v. *Garriguez*, 1 Haywood 241 (N. Car., 1795) and *Commonwealth* v. *Cook*, 6 Serg. & R. 577 (Pa., 1822). It was upheld in *People* v. *Olcott*, 2 Johns. Cases 301 (N.Y., 1801), *People* v. *Goodwin*, 18 Johns. 187 (N.Y., 1820), and *Commonwealth* v. *Bowden*, 9 Mass. 494 (1813). The difference in approach on this question of power has continued to this day so that, while all States now recognize the power to discharge a jury in case of disagreement, there is still a difference in state courts as to whether the power to grant a mistrial will be broadly or narrowly construed.[11]

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*United States* v. *Gilbert*, 2 Sumner 19, 56, 25 Fed. Cases 1287 (No. 15,204) (D. Mass. 1834) (emphasis added).

[10] Blackstone's version of the rule (4 Blackstone, *Commentaries*, 360) was that, after evidence had been presented "the jury cannot be discharged (unless in cases of evident necessity) till they have given in their verdict * * *." It should be noted that Blackstone's statement is given, not in relation to a plea of *autrefois acquit* or *convict* but in his discussion of procedure at the trial. Note also that the limitation was said to apply after evidence had been presented.

[11] The decisions are summarized by states in 2 Wharton, *Criminal Procedure* (10 ed.), Secs. 1427–1457.

Possibly because the question of power had historically been linked to an abuse of royal power, or perhaps because United States lawyers and judges tended to think in terms of constitutional limitations, the American decisions on the right to discharge a jury began early to take on constitutional overtones, with the double jeopardy clauses of the state constitutions being interpreted as going beyond the pleas of *autrefois acquit* or *convict* and including protection, at least in some circumstances, against a second trial even though the first had aborted before verdict. See, *e.g.*, *Commonwealth* v. *Cook*, 6 Serg. & R. 577 (Pa. 1822). The United States courts, unlike the British, have never been willing to trust the unreviewable discretion of a trial judge on granting a mistrial, however much his discretion is unreviewable on granting a judgment of acquittal. Justice Washington, who, as discussed above, expressed the view in *United States* v. *Haskell*, 4 Wash. C.C. 402, 26 Fed. Cases 207 (No. 15,321), that the double jeopardy clause did not apply at all to cases of mistrial, indicated that on a motion in arrest of judgment it would be proper to consider whether a discharge of the first jury for the reason assigned by the trial judge was legally valid.[12] The implication of *Perez*, that the double jeopardy clause applies exclusively to cases of former acquittal or conviction, has not been followed to the logical extreme of the British cases. While this Court, in every case that has come before it, has upheld the retrial

[12] A contrary view was expressed in a long opinion reviewing the authorities in *United States* v. *Bigelow*, 14 D.C. 393 (1884).

after discharge for one of a variety of reasons,[13] the very fact that the Court considered the reasons for the discharges conveys some implication that a second trial might be barred as double jeopardy, depending upon the reasons for the discharge. The most recent decisions of the Court have made explicit that in some circumstances the double jeopardy clause would be held to apply to mistrials. See *Wade* v. *Hunter,* 336 U.S. 684, 688; *Gori* v. *United States,* 367 U.S. 364.

The "type of oppressive practices at which the double-jeopardy prohibition is aimed" (*Wade* v. *Hunter, supra,* 688–689), and by which its content in the context of retrial after discharge of a jury is to be defined, was spelled out in a somewhat different context, in *Green* v. *United States,* 355 U.S. 184, 187–188:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to

[13] *Simmons* v. *United States,* 142 U.S. 148 (publication of controverted reports of a juror's acquaintance with defendant); *Logan* v. *United States,* 144 U.S. 263, 297–298 (failure to agree); *Thompson* v. *United States,* 155 U.S. 271 (discovery of disqualification of juror who had served on grand jury); *Lovato* v. *New Mexico,* 242 U.S. 199 (technical discharge and reswearing of jury in erroneous belief that defendant had not yet pleaded); *Wade* v. *Hunter,* 336 U.S. 684 (court-martial dismissed when military advance of unit made it impracticable to obtain additional witnesses desired to be heard by court-martial); *Gori* v. *United States,* 367 U.S. 364, 369 (mistrial granted on court's own motion for what court believed to be misconduct of the prosecutor).

> make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Referring specifically to the applicability of the double-jeopardy clause when a trial is terminated before verdict, the Court gave as the reason for that application that it "prevents a prosecutor or judge from subjecting a defendant to a second prosecution by discontinuing the trial when it appears that the jury might not convict" (355 U.S. at 188).

However, in all the cases that have come before it, this Court has made it clear that, where there has been no adjudication on the merits, the question of the right to retry a defendant after a jury has been discharged is a matter which cannot be encompassed in rigid technical concepts. From its earliest decision in *United States* v. *Perez*, 9 Wheat. 579, to its latest decision in *Gori* v. *United States*, 367 U.S. 364, this Court has emphasized that the matter is one which must in large part lie in the discretion of the trial judge. In terms of the standards by which the trial courts are to be governed in declaring mistrials, the Court "has long favored the rule of discretion in the trial judge to declare a mistrial and to require another panel to try the defendant if the ends of justice will be best served." *Brock* v. *North Carolina*, 344 U.S. 424, 427. And in determining whether a retrial is barred once a jury has been discharged, the Court has looked

to all the circumstances of the particular case to determine whether the retrial violated the underlying "intent" of the Fifth Amendment. In *Wade* v. *Hunter*, 336 U.S. at 688–689, the Court, in an opinion by Mr. Justice Black, noted that the Fifth Amendment:

> * * * does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed. * * * [A] defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments.

The Court expressly rejected a standard requiring an "imperious" or "urgent necessity" for a mistrial or even a rule that the absence of witnesses can never justify a discontinuance, saying (*id.* at 691): [11]

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[11] Cf. the decision of Mr. Justice Story, on circuit, in *United States* v. *Coolidge*, 2 Gall. 364, 25 Fed. Cases 622 (No. 14,858), granting a government motion for a mistrial when an essential witness unexpectedly refused to be sworn. Reflecting the concerns later expressed by the Court in *Wade* v. *Hunter*, *supra*, Mr. Justice Story stated (25 Fed. Cases at 623): "* * * Suppose that this were a capital case, and that, in the course of the investigation, it had clearly appeared, that on [the witness'] testimony depended a conviction or an acquittal: would it be reasonable that the cause should proceed? [The witness] may, perhaps, during the term, be willing to testify. Under these circumstances, I am of opinion, that the government is not bound to proceed, but that the case be suspended until the close of the term, that we may see, whether the witness will not consent to an examination."

> * * * Such a rigid formula is inconsistent with the guiding principles of the *Perez* decision to which we adhere. Those principles command courts in considering whether a trial should be terminated without judgment to take "all circumstances into account" and thereby forbid the mechanical application of an abstract formula. The value of the *Perez* principles thus lies in their capacity for informed application under widely different circumstances without injury to defendants or to the public interest.

Both the "public interest" and the rights of a defendant must be considered in determining whether re-trial after discharge of a jury violates the double jeopardy clause. The standard of the "ends of public justice," to which petitioner excepts (Br. 5), has been the touchstone in this country throughout its history. It requires that all the circumstances of the case be considered, including the interest of the accused that he not be put to the expense, the mental strain and the harrassment of protracted litigation. It includes his right to be protected against dismissal in order to help the prosecution, "at a trial in which its case is going badly, by affording it another, more favorable opportunity to convict the accused." *Gori* v. *United States*, 367 U.S. at 369. It also takes into consideration the interests of the public, represented by the government, in having a full trial on the merits of the charges brought by the grand jury. It further takes into consideration the practical considerations that govern a trial court in handling a docket of cases which affect the affairs of the public generally. It is in the light of all these that this case must be judged.

## II

### ON THE PARTICULAR FACTS OF THIS CASE, RETRIAL OF THE DEFENDANT WAS NOT UNFAIR AND THEREFORE DID NOT CONSTITUTE DOUBLE JEOPARDY

#### A. PETITIONER WAS IN JEOPARDY IN ONLY THE MOST TECHNICAL SENSE OF THE TERM AND WAS NOT PREJUDICED BY THE DISCHARGE OF THE JURY

Before discussing the application of the foregoing principles to the facts of this case, it may be well to point out that the question of when jeopardy attaches has significance only in framing the issue presented. Obviously, if it could be said that jeopardy had not attached at all—that what occurred was merely a nonsuit or a continuance—there would be no problem of "double jeopardy" and the clear absence of any prejudice to the petitioner would undoubtedly warrant an affirmance of the decision below. However, the fact that jeopardy may have attached does not, in our view, require a contrary result, but only defines the question as one involving the Constitution. The answer, as the history of the double jeopardy clause shows, depends upon the essential fairness to the public and the petitioner of the discharge and order for retrial.

We do not dispute petitioner's position that under the federal decisions, "jeopardy" attaches at the time the jury is sworn so that the constitutional issue is presented here. This seems to be the implication of *Lovato* v. *New Mexico*, 242 U.S. 199, where the judge discharged the jury after it had been impaneled in order to permit the re-arraignment of the defendant after overruling a demurrer, and had the same

jury resworn. The fact that the Court discussed the right of the trial court to do this indicates that the question of jeopardy does arise once the jury has been sworn.

Nevertheless, in determining whether what occurred here involved basic unfairness to the petitioner, it is well to note that this case had not progressed to the point where the trial could be said, in any realistic sense, to have begun. The jury, although chosen, had not even assembled in the box. Under the old practice, where jeopardy was said not to attach until a jury was "charged" with the case, *i.e.*, until the indictment had been read to them, there would have been no jeopardy at all. See Wharton, *Criminal Procedure* (10 ed.) Sec. 1454; *McFadden* v. *Commonwealth*, 23 Pa. 12. The prior "jeopardy" in this case was jeopardy only in the most technical sense of the term, without in any realistic sense subjecting the defendant to the hardships of a trial. Accordingly, there is absolutely no basis for petitioner's claim of prejudice—unless it refers to the necessity of undergoing a trial on the merits.

In the language of *Bigelow* v. *United States*, 14 D.C. 393, 397 (1884):

> The processes of impaneling and swearing them have only the effect to organize and qualify the tribunal by which the prisoner is to be tried, and the charge had only the effect to inform them of the nature of the duty they were to perform in that trial. In either case they are only ready for the performance of their functions; but they have not thereby begun their actual performance.

To say that a two-day continuance and a trial before the jury chosen on April 25 would have been proper, but that the discharge of a jury which had not assembled to hear the case followed by retrial two days later must give the defendant the benefit of a judgment of acquittal, exalts form over substance. Since the only difference in the right of the defendant would be in the composition of the jury chosen to try the case, such a ruling would in effect return to 16th century notions of the mystical nature of a jury sworn to try a case.

B. THIS CASE INVOLVED A MERE OVERSIGHT AND NOT A FAILURE OF EVIDENCE ON THE PART OF THE PROSECUTION

The prosecution is not entitled to a mistrial because its case is going badly. A retrial in those circumstances would represent such oppression as would justify a plea of double jeopardy. For this reason, the action of the prosecutor in entering a *nolle prosequi* after the trial had begun, was properly held to have the effect of an acquittal and to bar reindictment. *United States* v. *Shoemaker,* 2 McLean 114, 27 Fed. Cases 1067 (No. 16,279). Unquestionably the courts tend to view with strictness attempts by the prosecution to obtain a discharge of the jury because of the absence of witnesses. *United States* v. *Watson,* 3 Ben. 1, 28 Fed. Cases 499 (No. 16,651); *Cornero* v. *United States,* 48 F. 2d 69 (C.A. 9). The *Cornero* case on its particular facts reached a correct result. In that case there was a continuance of five days because the government witnesses could not be found, followed by a mistrial and a second trial two years later. In that

situation, not only was retrial after two years a harassment of the defendant, but in a realistic sense it could be said that the government proceeded to trial without its evidence. In this case, on the other hand, the government was not proceeding to trial without knowing that it had the witnesses to prove its case. It knew that the witnesses were available; the only failure was to check on whether the available witness had in fact been served with the subpoena which had been issued.[15]

The trial court properly found that the failure of the prosecution to know of the absence of a key witness was an excusable oversight. The situation, in brief, was that on Wednesday or Thursday of the preceding week the court had asked that some twelve cases be set down for the following Monday. Sub-

[15] The circumstances of *Watson* similarly distinguish that case from this. There the district court granted an eight-day continuance when, following the swearing of the jury, the government advised that the district attorney was ill and that its witnesses were absent. When the trial was resumed twelve days after the continuance was granted, the assistant district attorney moved that the trial "go off for the term" because of the illness of the district attorney and the absence of witnesses for the prosecution. The court thereupon directed the withdrawal of a juror. In holding that the circumstances did not warrant the discharge of the jury and that the defendant's retrial was barred, the court noted that it did not appear that the illness of the district attorney occurred after the jury was sworn, that it was impossible for the assistant district attorney to conduct the trial or that the absence of the witnesses was first made known to the law officers of the government after the jury was sworn. There is no indication that subpoenas for the witnesses had been issued or of any circumstances justifying the absence of the witnesses (28 Fed. Cases at 499–501).

poenas were issued for all the approximately 100 witnesses and placed in the hands of the marshal for service. This case was number ten on the list, but was reached on Tuesday. The prosecutor's office was short-handed, the trial attorney had been trying another case that morning, he had the previous day accepted verbal assurances that this particular witness would be located. He announced ready without checking on this and the jury was selected before he discovered his mistake. That this explanation was not a mere cover for negligent preparation was verified by the trial judge, who personally knew the situation. That one witness of the approximately one hundred for whom subpoenas had been issued was not served and that the failure had escaped the trial attorney's attention was understandable. It was certainly not an error of the cataclysmic proportions attributed to it. Even if the oversight be deemed inexcusable, it certainly was not deliberate. There is no basis in the record for the suggestion that the occasion was used as a means of getting a "free look" at the jury and no basis for the contention that an affirmance will give other prosecutors in other cases the opportunity for a free look. When and if such a situation should arise, the courts have ample powers to deal with it so as to protect the rights of defendants. In this case there was an oversight which, whether excusable or not, merely resulted in a two-day postponement. Petitioner's attempt to formulate a rigid rule on the basis of *Cornero* has already been

rejected by this Court in *Wade* v. *Hunter*, 336 U.S. 684, 691, where it said:

> We are asked to adopt the *Cornero* rule under which petitioner contends the absence of witnesses can never justify discontinuance of a trial. Such a rigid formula is inconsistent with the guiding principles of the *Perez* decision to which we adhere. Those principles command courts in considering whether a trial should be terminated without judgment to take "all circumstances into account" and thereby forbid the mechanical application of an abstract formula. The value of the *Perez* principles thus lies in their capacity for informed application under widely different circumstances without injury to defendants or to the public interest.

See also *United States* v. *Coolidge*, 2 Gall. 364, 25 Fed. Cases 622 (No. 14,858).

Here there was no harassment. There was a mistake by the prosecution in stating that it was ready—a mistake which was discovered before the defendant, in any realistic sense, had been put to the burden of trial. An inadvertent error by a human prosecutor ought not to deny the public its day in court and allow a defendant to go free without a trial.

C. THE FACT THAT THE JUDGE MIGHT HAVE CHOSEN ALTERNATIVE METHODS OF DEALING WITH THE SITUATION DOES NOT WARRANT GIVING PETITIONER THE BENEFIT OF A JUDGMENT OF ACQUITTAL WHEN DISCHARGE OF THE JURY DID NOT AFFECT HIS RIGHTS

From the vantage point of hindsight, without the pressures of conducting twelve cases in one week, it may be evident that both the Assistant United States Attorney and the trial judge might have handled the

matter somewhat differently. The prosecutor might have asked for and the judge, having found excusable oversight, might have granted a two-day continuance. This would have tied up the jury which had already been selected, and the judge, at that moment concerned with his calendar, obviously considered this an undesirable solution. As we have already pointed out, the insubstantial nature of any claim of prejudice in this case is emphasized by the fact that it seems to be conceded that a two-day continuance would have been proper. And the formalistic, unrealistic nature of the claim presented in this case becomes even clearer when it is noted that, if the judge had granted a continuance over the objection of the defendant and, after conviction, on appeal such a continuance had been held improper, petitioner could have been retried after suffering not only the tensions of a full trial but also the disclosure of his entire defense. Yet he asks this Court to rule that the decision to discharge a jury which had never begun to hear the case prevents there ever being a trial of the merits.

Petitioner made the suggestion that the trial proceed on the four counts as to which the government witnesses had been subpoenaed, saying that he would just as soon have two trials. Petitioner did not then call to the attention of the judge the fact that a second trial on the two counts might be barred, and the judge quite correctly, both from the point of view of the calendar and the rights of the defendant, refused to have a properly joined case against one defendant split into two trials. Conceivably, the Assistant

United States Attorney could have gone ahead at that point on the four counts, on the theory that four counts would support any sentence the judge was likely to give. But the prosecutor, before trial, may well have felt that the witness who was not there was the strongest witness he had, and he cannot be blamed for not wishing to go to trial with the evidence which he knew would be readily available in the next day or two. Even on a trial of the first four counts, the testimony of the witness would have been relevant and admissible as showing petitioner's intent and purpose. *Nye & Nissen* v. *United States,* 336 U.S. 613, 618; *United States* v. *Bucciferro,* 274 F. 2d 540 (C.A. 7); *Brehm* v. *United States,* 196 F. 2d 769 (C.A.D.C.), certiorari denied, 344 U.S. 838.

As we see the question in this case, it is not whether the prosecutor, or even the judge, made a mistake in discharging the jury. The question is whether the mistake was the kind of mistake which so deprived the petitioner of his rights that he is entitled to the effect of a verdict of acquittal without any trial on the merits. Human beings—judges, prosecutors and defense counsel—do make mistakes. Where such mistakes result in the infringement of a basic right of a defendant, where such mistakes result in the subjection of a defendant to the tension of real successive trials, the mistakes may result in a guilty defendant going free. But not every mistake rises to this category. Errors by a judge which result in the granting of a mistrial have been held not to bar a second trial. *Scott* v. *United States,* 202 F. 2d 354

(C.A.D.C.), certiorari denied, 344 U.S. 879; *United States* v. *Giles,* 19 F. Supp. 1009 (W.D. Okla.). Errors by a prosecutor, which do not affect a defendant's rights, should not be held to a more rigorous standard.

The Court ever since *United States* v. *Perez,* 9 Wheat. 579, has recognized that the "ends of public justice" must be considered in determining whether there shall be a retrial after declaration of a mistrial. The constitutional provision for trial by jury does not concern the defendant alone. Article 3, Section 2, clause 3, states in terms that the trial "shall be" by jury, thereby creating a right in the people generally and in their government to have criminal prosecutions tried. The government's consent is therefore required to waive a jury trial. See *Patton* v. *United States,* 281 U.S. 276, 312; Rule 23(a), F.R. Crim. P. Similarly, this Court in *Ex parte United States,* 287 U.S. 241, 249, upheld the "absolute right" of the government, as the representative of the public, "to put the accused on trial"; and in *United States* v. *Thompson,* 251 U.S. 407, 415, the court overruled an "assertion of the judicial discretion * * * incompatible with * * * the right of the Government to initiate prosecutions for crime * * *." Thus, while the defendant is entitled to be protected against harassment and unfair tactics, the government too, and the public whom it represents in enforcing the criminal laws, are entitled to a fair opportunity to present their case and obtain an adjudication on the merits. Where a jury which has not begun to hear the case is discharged because of an inadvertent oversight by the

prosecution and trial is had two days later, a defendant has no more been harassed than he would have been if a continuance had been granted. Under such circumstances, the discharge of the jury should not be deemed the equivalent of a judgment of acquittal.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

ARCHIBALD COX,
*Solicitor General.*
HERBERT J. MILLER, JR.,
*Assistant Attorney General.*
BEATRICE ROSENBERG,
*Attorney.*

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